ISSN 1712-4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

August 2014

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. These decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Health and Safety – Timeliness – The Board held that when an inspector's order is unclear and a party seeks to have it clarified prior to launching an appeal, the date of the later report can be used as the date from which the thirty-day statutory appeal period should be counted – Application for suspension dismissed on the merits

AECON UTILITIES; RE: A Director under the Occupational Health and Safety Act; OLRB File No. 0822-14-HS; Dated July 18, 2014; Panel: David A. McKee (4 pages)

Certification – Charter of Rights and Freedoms – Practice and Procedure – The responding party argued that the applicant and the Board had violated s. 16(3) of the Charter when the application and the Board's initial communication with the responding party were delivered to it in English although its offices were in Quebec – The Board noted that when it was advised that the responding party required materials in French, the Board immediately had its materials translated and forwarded to the responding party (and extended the time for filing a response) – Further, when the Board offered to have this matter proceed in French, the responding party advised that it was content to have it proceed in English – The Board held that s. 16(3) of the Charter is a declaratory provision and incapable of being violated – The Board invited submissions from the responding party on the application of the *French Language Services Act* – Matter continues

FILTRUM INC. AND/OR FILTRUM CONSTRUCTION AND/OR FILTRUM INC. C.O.B. AS FILTRUM CONSTRUCTION RE: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; OLRB File No. 0583-14-R; Dated July 3, 2014; Panel: Harry Freedman (6 pages)

Certification – Construction Industry – Practice and Procedure – The responding party challenged the propriety of an application for certification that was delivered to it in Quebec in the English language only, arguing that the application was void *ab initio* because it violated the *French Language Services Act* – In an earlier decision (see above, decision dated July 3, 2014), the Board directed the responding party to file all material facts necessary to establish the evidentiary record for its assertion that its rights under the FLSA had been violated – The responding party acknowledged that as a result of the Board's earlier decisions in this matter, it was in the same position it would have been in had it received the application and the Board's initial forms in French rather than English – The Board accepted that if the responding party could demonstrate a *prima facie* violation of the FLSA, it would assume a violation had occurred (a best

case scenario) – According to the responding party, the Board's failure to ensure that the forms used when francophone employers are affected by Board proceedings contain adequate information in the French language is a violation of the FLSA – There was no dispute that the FLSA does not apply to the actions of the applicant trade union – The Board held that in light of the responding party's concessions regarding a lack of prejudice in the handling of this matter to date and with a view to the proper application of the purposes of the *Labour Relations Act* in certification proceedings, there was no violation of the FLSA – Matter continues

FILTRUM INC. AND/OR FILTRUM CONSTRUCTION AND/OR FILTRUM INC. C.O.B. AS FILTRUM CONSTRUCTION; RE: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; OLRB File No. 0583-14-R; Dated July 21, 2014; Panel: Harry Freedman (11 pages)

Abandonment – Certification – Construction Industry – Delay – Related Employer – LIUNA OPDC sought certification for a bargaining unit of employees of a number of allegedly related FCMI companies, stating that Local 183 may already hold bargaining rights for some or all of the responding parties – Local 183 intervened in the certification application, and OPDC filed a s. 1(4) application – The responding parties challenged Local 183's position, charging that Local 183's late assertion of bargaining rights was seriously delayed and tantamount to abandonment – The Board approached the related employer litigation from two perspectives: (1) OPDC's claim for representation in any of the responding parties, subject to Local 183's pre-existing rights; and (2) the scope of Local 183's pre-existing rights, acquired in 1981 and 1982, and how far they extend to any of the related companies – The latter aspect brought about the issue of delay – FCMI submitted that it had openly engaged in work on 113 projects between 2007 and 2012, only a portion of which was subcontracted to companies bound to the OPDC or Local 183; the union's failure to assert its rights over that five year period should suggest to the Board that there was an abandonment – OPDC and Local 183 argued that for the Board to find abandonment there would have to be evidence of a positive or affirmative action on the union's part, and FCMI would have to show some prejudice; neither was in evidence – The unions submitted that there was a difference between finding abandonment and an exercise of discretion under s. 1(4) of the Act – The Board's power is not limited to a granting or dismissal of the related employer application; there is a middle ground, where the retrospective effect of a declaration can reduce the impact on the responding parties – The Board found that Local 183 had no need to assert its rights with FCMI because the majority of the projects undertaken by the employer were in fact in accordance with the collective bargaining agreement – The responding parties' arguments of prejudice were rejected by the Board; the prejudice identified was in the normal course in the context of related employer applications – Motion dismissed – Matter continues

FIELDGATE CONSTRUCTION MANAGEMENT INC. ET AL; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Universal Workers Union, Labourers' International Union of North America, Local 183; OLRB File No. 1401-12-R; Dated July 10, 2014; Panel: Jesse M. Nyman (20 pages)

Certification – Construction Industry – The Painters sought certification for a bargaining unit of drywall tapers – The Operative Plasterers intervened, claiming they held bargaining rights for the sought-after bargaining unit, and filed a concurrent related employer application that would bind this employer to their collective agreement – Each union argued that its collective agreement gave it exclusive rights over anyone working as a drywall taper – The Board refused to allow the unions to conflate bargaining rights with work jurisdiction claims – Ministerial designations for both unions describe different types of work but do not define bargaining rights or create any exclusive form or claim to a particular kind of work – Similarly, employer accreditations do not confer any exclusivity for representation to either union – Neither do their respective collective agreements: the overlap does not bar the certification of another union – Although the Board's jurisprudence and indeed the whole of the construction industry may regard drywall taping as a "craft," that fact has no significance in terms of defining the representational rights of either union – Even if the Plasterers' agreement were found to be binding on the responding party, that would not pose a bar to the Painter's application – The Board has never regarded the possibility of jurisdictional disputes as a reason not to certify a union – Certificate issued

H.M. CONSTRUCTION LTD.; RE: International Union of Painters and Allied Trades, Local Union 1891; OLRB File No. 3495-13-R; Dated July 10, 2014; Panel: David A. McKee (16 pages)

Construction Industry Grievance – Discharge – CUSW grieved the suspension and subsequent discharge of WA – The Board documented WA's history with Hydro One, up to and including events that occurred immediately before her discharge, with a view to determining if WA's conduct was in any way justifiable and warranting the discipline meted to her – WA testified to several instances of harassment and discrimination, but admitted she did not pursue these with her union or management; on the other hand, there were allegations of WA's behaviour that caused Hydro One to undertake an independent investigation of her conduct, and that led to her suspension and discharge – Ultimately, the Board considered all of WA's behaviour in the context of this workplace, the culture there and the circumstances of WA's experiences there – The Board concluded that WA engaged in workplace violence when she made remarks about her tools as weapons and expressed a willingness to use them, but there was no pre-meditation, no previous pattern of extreme conduct and an unlikelihood that she will repeat the behaviour – The penalty was excessive; remedy remitted back to the parties

HYDRO ONE INC.; RE: Canadian Union of Skilled Workers; OLRB File No. 3116-11-G; Dated July 23, 2014; Panel: Patrick Kelly (23 pages)

Employee – Employment Standards – The applicant sought review of an Officer's refusal to award him vacation and termination pay – The indicia of the engagement between the parties clearly indicated that the applicant was an independent contractor and not an employee or dependent contractor – Among other things: he invoiced for hours worked, sometimes discounting his hours; he collected HST in respect of billings; he received no T4 slips and could not remember ever providing Kalex with his social insurance number; he worked for other clients; initially he used his own equipment, but latterly had use of a Kalex computer; email exchanges between the parties continuously and consistently showed that he sought to *become* an employee – Application dismissed

KALEX VALUATIONS INC.; RE: Brent Spurr; RE: Director of Employment Standards; OLRB File No. 1770-13-ES; Dated July 17, 2014; Panel: Mary Anne McKellar (5 pages)

Bar – Certification – Practice and Procedure – The responding party moved to have the Board exercise its discretion to bar a third application for certification filed by the same union within a two-week period – The first application, for a bargaining unit of 31 employees, was withdrawn with leave of the Board when the responding party provided its list (156 employees) and raised a s. 8.1 challenge – The second application, again for 31 employees, had an inadvertently truncated description of the bargaining unit and the Board refused to allow the applicant to amend its application to correct the defect, but permitted the applicant to concede the s. 8.1 challenge in the second application (the employer said there were 147 individuals in the proposed unit) – In the third application, the applicant indicated there were 31 individuals in the unit; the employer countered with a list of 68 employees, again gave notice under s. 8.1 of the Act, and moved for a dismissal of the application and a one-year bar because of the applicant's abusive and vexatious conduct in filing three successive applications – The Board found that the first application was withdrawn and the second was dismissed under s. 8.1(5) paragraph 7 – A majority of the Board held that the short timeframe within which the three applications were filed made the cases the responding party was relying on distinguishable – The first two applications did not constitute an abuse of process and were not vexatious; the importance of giving effect to employee wishes outweighed any potential inconvenience to the responding party – Matter continues

NORTHLAND PROPERTIES CORP. O.A. SANDMANE SIGNATURE HOTEL TORONTO AIRPORT; RE: UNITE HERE Local 75; OLRB File No. 2614-13-R; Dated July 22, 2014; Panel: Roslyn McGilvery and Shannon McManus; R. O'Connor dissenting (16 pages)

Certification – Construction Industry – Employee – Status – The Union challenged the status of five employees as not performing bargaining unit work within the construction industry – The Board directed that the employees' status be determined on the basis of written submissions – A number of the employees were working their first day with the employer, who argued that the Board should consider what the employees did *after* the date of application – The Board rejected this position, suggesting that it

could lead to manipulation and gerrymandering; there might be instances where an employee's activities before the date of application might be admissible and applicable–for example, to establish the managerial components of an individual's responsibilities–but these did not obtain here – In the instant case, the employer operated a yard that was coincidentally located immediately adjacent to the construction site – The disputed employees performed their work (or were trained) in the yard on the date of application – The Board held that the proximity of the yard to the site could not be determinative – Moreover, the yard was owned and operated by the responding party, not the owner of the construction site – The Board also rejected the employer's argument that s. 126(1) of the Act could operate to include employees who work off-site but who are commonly associated in work or bargaining with on-site employees; in this case the employees being trained in the yard on their first day of employment did not meet, engage with or participate in any way with on-site employees, nor did they do any work on the application date that contributed to the on-site work – The employees engaged in wood splitting (processing the bushes and trees that had been removed from the construction site) were similarly in no way tied to the construction work at the site, neither preparatory to the construction process nor part of any sequence destined for the construction – Yard employees found not to be engaged in construction – Matter continues

QUALITY HAULAGE AND FARMING LTD.; RE: International Union of Operating Engineers, Local 793; OLRB File No. 3319-13-R; Dated July 16, 2014; Panel: Bernard Fishbein (13 pages)

Employment Standards – The applicant complained that she had been constructively dismissed because the employer was repeatedly late and inconsistent in depositing employees' pay in their accounts; in particular, the delay in the final two payments was significantly longer than other late payments – The parties' dispute about the "recurring pay period" was decided in the applicant's favour: while every other Friday was a pay processing day, the employer failed to establish that the following Tuesday was payday – A recurring payday must be a fixed day, and consistent payment of an employee's wages is a fundamental term of any employment contract – In the circumstances of the present case, it was reasonable for the applicant to be concerned about the payment of her wages, especially when the employer wrote to employees suggesting they stay home until the employer's cash flow problems were resolved – The employee was constructively dismissed – Termination pay ordered – Application granted

VE COLLECTIVE INC.; RE: Honga Ma; RE: Director of Employment Standards; OLRB File No. 1457-13-ES; Dated July 14, 2014; Panel: Roslyn McGilvery (8 pages)

COURT PROCEEDINGS

Change in Working Conditions – Judicial Review – Unfair Labour Practice – The union sought review of a Board decision dismissing its unfair labour practice complaint – The complaint alleged the employer had violated the freeze provisions of the Act when it reduced benefits to employees following a successful displacement application of the bargaining agent – The Board found that changes to the benefit plan met the reasonable expectations of employees following a change in bargaining agent; the employer's obligation was only to make monthly payments to the trust fund, not for specific benefits – On judicial review, the Court found the Board's decision was reasonable – Application dismissed

GATE GOURMET CANADA INC.; RE: Milk and Bread Drivers, Diary Employees, Caterers and Allied Employees, Local Union No. 647; RE: Ontario Labour Relations Board; OLRB File No. 3688-11-U; Court File No. 321/12; Dated April 9, 2014; Panel: Then, Aston and Harvison Young, JJ. (9 Pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
LIUNA- Trisan Divisional Court No.342/14	2620-13-G 2001-13-G et al	Pending
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Avis Installation Inc. Divisional Court No. 226/14	1766-13-R	Abandoned
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	Pending
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Jan 19/15
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	October 28, 2014
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Dismissed July 24/14

Weihua Shi Supreme Court of Canada No. 35837	0273-10-ES	Dismissed July 31/14
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)
EllisDon Corporation Court of Appeal No. C58371	0784-05-G	October 8, 2014 Court of Appeal
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above